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REMARKS

In the Final Office Action mailed January 29, 2007, claims 1-28, 32-48 and 57-64 were pending and stand rejected. Claims 29-31 were objected to but indicated to be allowable if rewritten in independent form incorporating the base claim and any intervening claims. Claims 1-5, 17, 26 and 41 have been amended in this response. Reconsideration of the present application including claims 1-48 and 57-64 is respectfully requested.

Claims 1-7, 15 and 16 were rejected under 35 USC 102(b) as being anticipated by U.S. Patent No. 1,400,616 to McCrory. Claims 1-5 have been amended. Support for the amendments to claims 1 and 2 may be found throughout the specification and drawings and at, of example, paragraph 56 of the publication of the present application. Claims 3-5 have been amended to maintain consistency with the amendments to claims 1 and 2.

Amended claim 1 recites, among other features, a frame, a number of retractors attached to the frame, "wherein said first and second portions of said frame each include a recess to receive clamping devices coupled to respective ones of said retractors, said clamping devices each including a foot with a pair of arms located on opposite sides of said frame and a receptacle defined between said pair of arms for receiving said frame between said pair of arms with said clamping devices being slideable from said respective recess along a respective one of said first and second portions of said frame for attachment to said respective portion of said frame at a selected position therealong spaced from said recess." McCrory, in contrast, discloses a frame 1 with through-holes to axially receive threaded stems 8 through the frame at selected positions about the frame, and a collar 4 and a wing nut 9 on stem 8. The collar and wing nut are engaged to one side of the frame 1 and are threaded along stem 8 to contact the frame 1 to pull the retractor against the incision and maintain the retractor in this position. However, the wing nut and collar are not clamping devices coupled to respective ones of the retractors about the frame as recited in claim 1. The collar and wing nut do not disclose a foot with a pair of arms on opposite side of the frame that define a receptacle between the arms for receiving the frame between the pair of arms. Thus, there is no disclosure of a clamping device having the configuration recited in claim 1.

Furthermore, the Final Office Action asserts that the screws are "slideable (screws can move in and out) from said respective recess along a respective one of said first and second

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portions of said frame for attachment to said respective portion of said frame at a selected position therealong spaced from said recess" and that "the screws fit through their respective recesses and are capable of movement relative to the frame." The assertion is traversed. While the threaded stems may be movable in the holes in the frame, the elements arranged as recited in claim 1 are not disclosed in McCrory. In contrast, once the screw is withdrawn from the hole in the frame of McCrory, it is detached from the frame and cannot slide along the frame from the hole to the next hole. If one were to attempt slide the screw from one hole to the next without detaching it from the frame, the portion of the frame around the hole would prevent the screw from sliding along the frame from the hole. Therefore, claim 1 and claims 2-7, 15 and 16 depending therefrom distinguish McCrory, and withdrawal of this basis of the rejection is respectfully requested.

Claims 2-7 and 15-16 depending from claim 1 are allowable at least for the reasons claim 1 is allowable and for other reasons. For example, amended claim 2 recites "wherein said frame includes an undercut portion extending therealong and at least one of said pair of arms of said clamping devices includes a recessed undercut portion shaped to receive said undercut portion of said frame to prevent said clamping devices from pivoting relative to said frame." McCrory fails to disclose this feature of claim 2. Claims 4 recites the frame includes first and second members, and claim 5 recites the frame includes third and fourth members. McCrory discloses that the frame is made from an "endless bar." See col. 1, lines 43-44. Accordingly, withdrawal of the rejections of claims 2-7 and 15-16 depending from claim 1 is respectfully requested.

Claims 41, 44 and 45 were rejected under 35 USC 102(b) as being anticipated by DE 8704901 to Kluger. Amended claim 41 recites, among other features, "first and second distractor mechanisms each movable along said frame and attachable to said frame at a selected position along said frame while extending transversely to said at least one plane...." Support for the amendment may be found throughout the specification and drawings and in the original claims, including, for example, paragraph 56 of the publication of the present application. Kluger, in contrast, discloses "frame" 2 and first and second "distractor mechanisms" 2, 4. Distractor mechanisms 2, 4 are not each movable along frame 2 and attachable to frame 2 at a selected position along frame 2. Accordingly, claim 41 is not disclosed by Kluger and withdrawal of this basis of the rejection of claim 41 is respectfully requested.

Kluger shows an arrangement where the frame 2 and mechanisms 2, 4 all move together when the first and second "distractor mechanisms" 2, 4 are moved about the pivoting portions 5, 5a. Furthermore, mechanism 4 is moveable along the threaded arm portion of mechanism 2 with a threaded nut 3, and thus only move in linear translation relative to one another along frame 2. Accordingly, there does not appear to be any disclosure of an arrangement including pivoting of "distractor mechanisms" 2, 4 toward and away from any frame since the frame and mechanisms 2, 4 are rigidly coupled to one another. Nor is there disclosed any adjustment mechanism that locks the distractor mechanism and is also pivotally engaged to the distractor mechanism to permit such movement.

Also, the Final Office Action asserts that element 2 is a frame and also that elements 4 and 2 are first and second distractor mechanisms. Claim 41 recites "a frame lying in at least one plane" and "first and second distractor mechanisms each movable along said frame and attachable to said frame at a selected position along said frame while extending transversely to said at least one plane, said first and second distractor mechanisms each including a distal end engageable to a respective one of said first and second anchors." It is not clear how element 2 can be a frame lying in a plane and also be a distractor mechanism that is attachable to itself and extend transversely to itself. Thus, a prima facie case for rejecting claim 41 in view of Kluger has not been established for this additional reason.

The Final Office Action also asserts that Kluger discloses "the proximal ends of said distractor mechanisms (30, 31) to pivot relative to said adjustment mechanism (22, 23) about said distal ends thereof toward and away from said frame." Elements 30, 31 are not proximal ends of the distractor mechanism, but rather are located at the distal ends of arms 17, 17a where the arms 17, 17a mount to the anchors. Claim 41 recites that the distractor mechanism includes "a distal end engageable to a respective one of said first and second anchors." Elements 30, 31 in Kluger are engaged to the anchors 19 and thus would appear to correspond to the distal ends of the "distractor mechanisms" 2 and 4, at least according to the arrangement of elements recited in claim 41. Accordingly, even if distal ends 30, 31 were able to pivot relative to adjustment mechanism 22, they are not proximal ends of the distractor mechanism and therefore do not disclose the arrangement of elements in claim 41 where "said adjustment mechanisms further each including a second condition in pivotal engagement with said respective distractor

mechanism to permit proximal ends of said distractor mechanisms to pivot relative to said adjustment mechanism about said distal ends thereof toward and away from said frame.” Accordingly, claim 41 and claims 44, 45 depending therefrom are allowable and withdrawal of this basis of the rejection is respectfully requested.

Claim 57-64 were rejected as being anticipated by U.S. Patent No. 5,728,046 to Mayer. The Final Office Action asserts with reference to Attachment A that arm 4 of frame 5 in Mayer is both an outer shaft and an inner shaft movably positioned in an outer shaft. It is not clear how an arm of the frame that is solid, like arm 2 shown in Fig. 3 of Mayer, and of one piece could be properly considered to disclose an inner shaft movably positioned in an outer shaft. Since arm 4 completely lacks an inner and outer shaft arrangement, it cannot disclose the inner shaft movably positioned in the outer shaft for the adjustment mechanism recited in claim 58. The Final Office Action also asserts that the linear teeth along arms 2, 4 of the frame and the engagement relationship with the teeth of elements 22, 23 is somehow a concave-convex pivot path of the distractor mechanism. It is not clear how the linear ratchet tooth profile along arms 2, 4 could form a concave pivot path for either of the support feet 39, 40 since there is no disclosure that either of the arms 2, 4 is concave or that support feet 39, 40 pivot relative to any portion of the respective arm 2, 4 to which it is engaged. While screws 22, 23 may be circular, they move linearly along the ratchet arm when rotated, and simply cannot be properly considered to define a concave-convex pivot path for the distractor mechanism. The Final Office Action also asserts that elements 22, 23 extend from a distal end of an inner shaft, which is presumably arm 4 based on Attachment A of the Final Office Action. However, it is clear that elements 22, 23 do not extend from the distal end of any portion of frame 2 or of any inner shaft. In order for a reference to anticipate a claim, the reference must disclose all elements of the claim arranged as recited in the claim. The Office Action has not demonstrated that Mayer discloses all the element of claim 57 arranged in the manner recited in claim 57. Accordingly, at least for these reasons, Mayer cannot properly support a prima facie case for rejecting claim 57 as being anticipated and withdrawal of the rejection of claim 57 is respectfully requested.

With respect to claim 58, the Final Office Action asserts that elements 22, 23 include a number of teeth that lockingly engage a number of teeth that are threads of a screw along a concave-convex pivot path of the distractor mechanism (threads of the screw and the teeth on the

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frame.) As shown in Fig. 2, support feet 39, 40 are coupled to frame 2 in a non-rotatable manner such that support feet 39, 40 could not pivot about frame 2. Mechanisms 22, 23 translate the support feet 39, 40 and elements 20 along the respective arms 2, 4 of the frame in a linear fashion. Accordingly, threads of elements 22, 23 and the linear teeth along arms 2, 4 of the frame do not define a concave-convex pivot path of the support feet 39, 40 as asserted in the Final Office Action. Furthermore, element 32 is asserted to be a pair of plates at the distal end of an adjustment mechanism, and elements 39 and 40 are somehow a pair of proximal flanges pivotally coupled to a pair of plates. Claim 58 recites that each distractor mechanism is coupled to respective ones of first and second adjustment mechanisms, and that each adjustment mechanism includes a pair of plates at its distal end coupled to a pair of flanges of the respective distractor mechanism. Element 32 is not a pair of plates for each "adjustment mechanism" nor is element 39 or element 40 a pair of flanges for each distractor mechanism. There simply is no disclosure of first and second distractor mechanism that each has a pair of flanges and adjustment mechanisms that each includes a pair of plates pivotally coupled to the pair of flanges of the respective distractor mechanism as recited in claim 58. In order for a reference to anticipate a claim, the reference must disclose all elements of the claim arranged as recited in the claim. The Final Office Action has not demonstrated that Mayer discloses all the element of claim 58 arranged in the manner recited in claim 58. Withdrawal of this basis of the rejection is respectfully requested.

With regard to claims 59-64 depending from claim 58, these claims are also allowable. For example, with respect to claim 59, it is not clear how element 39 can be proximal flanges as recited in claim 58 and also a roller pin coupled between element 32 and extending through an arcuate slot of element 32. Withdrawal of this basis of the rejection of claims 59-64 is respectfully requested.

Claims 8-11, 13, 17, 21-27, 32, 33, 36-43 and 46-48 were rejected under 35 USC 103(a) as being unpatentable over McCrory in view of Mayer. Claims 8-11 and 13 depend directly or indirectly from claim 1 and are believed allowable at least for the reasons claim 1 is believed allowable. Accordingly, withdrawal of this basis of the rejection of claims 8-11 and 13 is respectfully requested.

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Amended claim 17 recites, among other features, first and second distractor mechanisms and “further comprising at least one adjustment mechanism engaged to at least one of said first and second distractor mechanisms, wherein said at least one adjustment mechanism includes a shaft having a distal end pivotally coupled with said at least one of said first and second distractor mechanisms at a pivoting coupling location adjacent a proximal end of said at least one distractor mechanism, said shaft extending away from said pivoting coupling location toward said frame and into a clamping device movable along said frame and operable to clampingly engage said adjustment mechanism to said frame.” Support for the amendment to claim 17 may be found throughout the specification and drawings, and at, for example, paragraphs 43, 58 and 63 of the publication of the present application.

In McCrory, the threaded stems 8 are fixed relative to the retaining hooks 12 at their proximal ends. Mayer also discloses an arrangement where threaded spindle 29 is fixed relative to the retractor body 32 at the location adjacent the proximal end of body 32 where they are coupled to one another. With regard to claim 17, the Final Office Action asserts that Mayer discloses “at least one adjustment mechanism (22 or 23) engaged to at least one of said first and second distractor mechanisms (22, 23 engage with 30, 31) at a pivoting coupling (22, 23) location adjacent a proximal end of said at least distractor mechanism (Figure 1) and a clamping device (24, 25) movable along said frame and operable to clampingly engage said adjustment mechanism to said frame (col. 3, lines 15-20.)” It is respectfully submitted that elements 22, 23 in Mayer do not include a shaft with a distal end pivotally coupled with bodies 32 at a proximal end of bodies 32, nor do elements 22, 23 include a shaft extending away from the proximal end of bodies 32 toward the frame and into a clamping device movable along the frame. Accordingly, neither of the references, either alone or in combination with one another, teaches or suggests the elements recited in claim 17. Withdrawal of this basis of the rejection of claim 17 and claims 21-27, 32, 33, and 36-40 depending therefrom is respectfully requested.

Amended claim 41 recites, among other features, “first and second distractor mechanisms each movable along said frame and attachable to said frame at a selected position along said frame while extending transversely to said at least one plane, said first and second distractor mechanisms each including a distal end engageable to a respective one of said first and second anchors; and first and second adjustment mechanisms coupled to respective ones of said first and

second distractor mechanisms adjacent a proximal end of said respective distractor mechanism, said adjustment mechanisms each including a first condition in locking engagement with said respective distractor mechanism to fixedly secure said distractor mechanism relative to said frame, said adjustment mechanisms further each including a second condition in pivotal engagement with said respective distractor mechanism to permit proximal ends of said distractor mechanisms to pivot relative to said respective first and second anchors engaged to said distal end thereof and with said proximal ends of said distractor mechanisms movable toward and away from said frame.” In McCrory, the threaded stems 8 are fixed relative to the retracting hooks 12 at the location adjacent the proximal end of the hooks 12 where they come together. As the stem 8 is moved through the frame through-hole, the proximal and distal ends of the hooks 12 follow the stem such that there is no pivoting of the proximal end of the retracting hooks about the distal end toward or away from the frame.

Mayer fails to remedy the deficiencies of McCrory since it also discloses an arrangement where threaded spindle 29 is fixed relative to the retractor body 32 with a corresponding one of the integral support feet 39, 40. As the location of the retractor body 32 is adjusted relative to the frame with spindle 29, the proximal and distal ends of the retractor body 32 also move together toward or away from the frame such that there is no pivoting of the proximal end of retractor body 32 about the distal end of retractor body 32 or relative to the anchors to move the proximal ends of retractor body 32 toward and away from the frame. For example, col. 4, lines 7-11 of Mayer discloses that adjustment of the nuts 30 and 31 repositions the support feet 39, 40 and the vertebral bodies engaged thereto. The Final Office Action asserts that “proximal ends of said distractor mechanisms (30, 31) pivot relative to adjustment mechanism (22, 23) about said distal ends thereof toward and away from said frame (col. 3, lines 29-36.)” A review of col. 3, lines 29-36 finds no disclosure or mention of pivoting of elements 30, 31. There is no portion of the retractor body 32 or support feet spindle 29 that pivots toward and away from the frame.


Furthermore, the Final Office Action provides no indication of how the references disclose that elements 22, 23 include any first condition in locking engagement with either of the support feet 39, 40 or “distractor mechanisms 30, 31”. Devices 24, 25 engage the teeth along the arms 2, 4 to maintain the position of holders 20, 21. See col. 3, lines 14-20. However, devices 24, 25 do not lockingly engage support feet 39, 40 or elements 30, 31 positioned about spindles

29. Accordingly, neither of the references, either or alone or in combination with one another, teaches or suggests the elements recited in claim 41, and withdrawal of this basis of the rejection of claim 41 and claims 42-43 and 46-48 is respectfully requested.

Claims 12, 14, 18-20, 28, 34 and 35 were rejected under 35 USC 103(a) as being unpatentable over McCrory in view of Mayer and further in view of U.S. Patent Application Publication No. 2002/0161368 to Foley et al. These claims depend from claims that are believed allowable. Accordingly, withdrawal of this basis of the rejection of these claims is respectfully requested.

Reconsideration of the present application as amended and including claims 1-48 and 57-64 is respectfully requested. The Examiner is encouraged to contact the undersigned to resolve any outstanding issues with respect to the present application.

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